

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1211

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

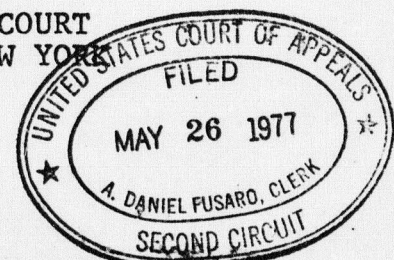
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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
VICTOR DELEON,
Defendant-Appellant.
-----x

Borges
Docket No. 77-1211

5/26

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

STEVEN LLOYD BARRETT,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET - U.S. District Court

Y OFFENSE PO ☐ JUDGE/MAGISTRATE Assigned U.S. DE LEON, VICTOR
 OFFENSE MO ☐ 0208 1 0834
 DEMEANOR Mis ☐ Disp / Sentence
 FELONY Fel ☒ District Office

Case Filed
 Mo. Day
 01 13
 No. of Def's
 * 02

77 0028 01

JUVENILE

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:472	Passing counterfeit Federal Reserve Notes	1
18:473	Dealing in Counterfeit Federal Reserve Notes	2

4/6

U.S. MAG.
 CASE NO. 76-1421

BAIL - RELEASE

☐ AMT ☐ Fugitive
 Denied ☐ Set ☐ Pers. Recog.
 S 000 ☒ PS
 Date ☐ 10% Deposit
☐ Bail Not Made ☐ Surety Bond
☐ Status Changed ☐ Collateral
 (See Docket) ☐ 3rd ☐ Other

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began *12/10/76	High Risk Date 01-13-77	1-20-77	Trial Set For 1-20-77	Disposition of Charges 3-1-77
Summons Served	Indict. Waived ☐	1st Plea 1-20-77	Trial Began	☒ Convicted
First Appearance	In Charging District	Final Plea 3-1-77	Trial Ended	☒ On All Charges
	Superseding ☐ Indict/Info ☐	☒ NG ☐ G ☐ NOL		☐ Acquired
		☐ NG ☒ G ☐ NOL		☐ Dismissed
				☐ On Government's Motion

MAGISTRATE

DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME
12/10/76	MDJ-08AB	12/11/76	MDJ-08AB	☐ DISMISSED
		PRELIMINARY EXAMINATION OR REMOVAL HEARING		☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
		☐ WAIVED ☒ NOT WAIVED		☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT OF C.D.
		☒ INTERVENING INDICTMENT		
COMPLAINT	12/10/76	MDJ-08AB		
OFFENSE (In Complaint)	18 USC 472 - POSSESSION OF FORGED, COUNTERFEIT FEDERAL RESERVE NOTES			

U.S. Attorney or Asst.

ATTORNEYS Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☒ PD

Richard F. Lawler,
 791-0065

Legal Aid. John P. Curley
 374-1737

-448

* Show last names and suffix numbers of other defendants on same indictment/information

MATOS

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
12/11/76		Complaint filed, Legal Aid assigned. Defendant released on his own recognizance.	
1/13/77		Indictment filed, 77 Cr. 28 Mac Mahon, J.	
1-20-77		Deft. (atty. John P. Curley present) for Leonard Joy pleads not guilty. R.O.R. Case assigned to MacMahon, J. for all purposes Bryan, J.	
2-28-77		Filed GOVT's requests to charge/	
3-2-77		Filed GOVERNMENT'S Memorandum in opposition to suppression motion.	
3-1-77		Deft. present with atty Leonard Joy Suppression hearing held. After testimony and argument, motion denied, opinion to follow. De Leon pleads guilty to Ct. 1 and Ct. 2 but right to appeal denial of suppression motion reserved on the consent of the Govt. Deft will be sentenced on 3-30-77. So ordered.... MACMAHON, J.	
3-2-77		Filed Deft's MEMORANDUM OF LAW in support of the deft's motion to suppress the counterfeit bills recovered from his person.	

Cont'd on page 2.

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY
	DOCUMENT NO.	
73-14-77	Filed MEMORANDUM on deft's motion to suppress certain evidence. Deft's motion to suppress is denied, So ordered Mac Mahon, J. m/n	
3-30-77	Filed JUDGMENT AND PROBATION/COMMITMENT ORDER - THE court, finds that the deft was twenty-three years of age at the date of conviction and is eligible for treatment under the Federal Youth Corrections Act and taking into account the factors prescribed in the statute, the court finds that deft would benefit from treatment as a YOUNG ADULT OFFENDER. Accordingly, it is adjudged that the deft is guilty as charged on Counts 1 and 2 as a YOUNG ADULT OFFENDER. The deft is sentenced on Counts 1 and 2 as a Young Adult Offender pursuant to Section 5010(a) of Title 18 U.S. Code as extended by Section 4209 of Title 18, U.S.C. Imposition of sentence on Counts 1 and 2 is suspended and deft is placed on PROBATION for a period of TWO (2) YEARS subject to the standing probation order of this court. So ordered MAC MAHON, J. All copies issued.	
4-6-77	Filed NOTICE OF APPEAL to the USCA by deft. from the Judgment filed 3-30-77. Mailed Notices - to USAtt and Atty for deft.	
FINE AND RESTITUTION PAYMENTS		
DATE	RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 CRIM. 020

UNITED STATES OF AMERICA

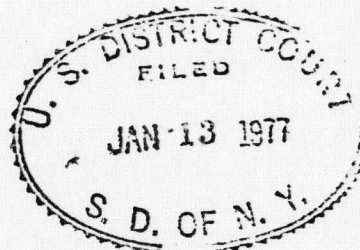
- v -

VICTOR DE LEON and
VICTOR MATOS,

Defendants.

INDICTMENT

77 Cr.



COUNT ONE

The Grand Jury charges:

That on or about the 10th day of December 1976 in the Southern District of New York VICTOR DE LEON and VICTOR MATOS, the defendants, unlawfully, wilfully and knowingly, with intent to defraud, did pass, utter, publish and sell and attempt to pass, utter, publish and sell and did keep in their possession and conceal falsely made, forged and counterfeited obligations and securities of the United States, to wit, falsely made, forged and counterfeited Federal Reserve Notes.

(Title 18, United States Code, Section 472 and 2.)

COUNT TWO

The Grand Jury further charges:

That on or about the 10th day of December, 1976 in the Southern District of New York and elsewhere, VICTOR DE LEON and VICTOR MATOS, the defendants, unlawfully, wilfully and knowingly did buy, sell, exchange, transfer, receive, and deliver false, forged, and counterfeited obligations of the United States to wit, false, forged and counterfeited Federal Reserve Notes, with the intent that they be passed, published, and used as true and genuine.

(Title 18, United States Code, Sections 473 and 2.)

Lucille A. Caranci
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

A TRUE COPY
RAYMOND E. BURCHARDT, Clerk

By *M. J. J.*
Deputy Clerk

14

JAN 15 1977

-8-77 Defers Prosecution as to deft. Miles, for one year.
d. So Ordered Mac, Mar. J. Jr -

3-30-77 Deft De Leon present (atly Leonard Joz) for Sentencing.
~~Sentencing~~ Deft found to be a Young Adult
Offender. Imposition of sentence suspended on Ct's
to Deft placed on Probation for 2 years.

Mac Mahon J. C.

77 CRIM. 0028
Form No. USA-33a-274 (Ed. 3-25-55)

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

VICTOR DE LEON and
VICTOR MATOS,

Defendants.

INDICTMENT

77 Cr.

(In violation of Title 18, United
States Code, Sections 472, 473 and
2.)

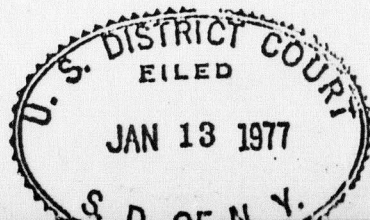
ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Lucille A. Carucci

Foreman.



JUDGE MAC MAHON

1-13-77 - Filed Indictment

MacMahon.

January 20, 1977-
Deft. Victor De Leon (Atty: John P. Curley)
pleads not guilty. ROR

Deft. Victor Matos (Atty: Leonard J. Levenson)
pleads not guilty. ROR. Case
assigned MacMahon for all purposes.

Dwyer J.

3-1-77 Deft. DeLeon present with atty. Leonard J.
Suppression hearing held. After testimony
and argument, motion denied, opinion
to follow. DeLeon pleads guilty
to Ct 1 and Ct 2 but right to appeal
denial of suppression motion reserved on
the consent of the Govt. Deft. will be
sentenced on March 30, 1977.

22

THE COURT: I deny the plea.

23

24

The question here is not whether the officers
had proved beyond a reasonable doubt that a crime had been

25

committed or that the defendants were the people who

1 committed it. The question is whether a reasonably
2 reasonable man, given the information in the possession of
3 these officers, would conclude that a crime had been
4 committed and that these defendants were the persons who
5 committed it.
6

7 There is no dispute in the testimony that
8 two men came into the store, one of them offered to buy
9 a shaving kit and tendered a \$50 bill which Mr. Morales
10 thought to be counterfeit and rejected it and gave it
11 back to the man. The man who tendered it was described
12 as a Hispanic about in his late teens or early twenties,
13 and Mr. Morales also observed what he was wearing at the
14 time. He was seen to cross the street and approach a
15 liquor store.

16 He came back into the store with a friend,
17 and the friend told him that the \$50 bill was all right,
18 but Morales still rejected it.

19 The two of them then left the store and got
20 into a Plymouth blue Roadrunner; both got in on the
21 passenger's side, one got into the back seat. A third
22 person was in the front seat on the driver's side.

23 The officers got the call on a radio giving
24 them a general description, that the people in the store
25 had tried to pass counterfeit money, that they were

2 Hispanics in their late teens or early twenties, that
3 there were two of them, that they went away in a blue
4 Plymouth Roadrunner with a wide stripe that was jacked
5 up high in the rear like a racecar.

6 They responded immediately to the call. It
7 was 7:00 o'clock at night in December.

8 While Mr. Morales was attempting to give them
9 a description, they decided to expedite things and
10 take Morales with them in the car.

11 They proceeded south on Broadway from the store
12 which was located on 101st Street. They went south to
13 somewhere about 89th Street or 90th Street following that
14 car. It is not clear whether they were following it all
15 the way. There is no vagueness about the description of
16 the car, however. It meant the car they had observed.
17 All witnesses, including Mr. Morales, told them that's
18 the car, that matched the description which he had given
19 earlier.

20 The car pulled over or stopped between 89th
21 and 91st Streets. Before that, one of the persons was
22 seen to leave the car. There is no evidence as to what
23 happened to the third person.

24 But, on the basis of that description, and
25 on the basis of the time factor which was estimated by

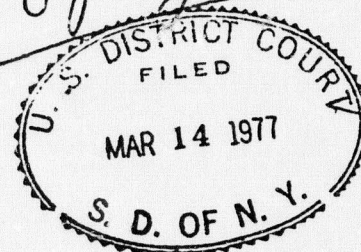
1
2 Officer Sommella to be about five minutes from the time
3 that they got the description to the time they apprehended
4 the defendants and searched the defendants, on the basis
5 of those facts alone, any reasonably prudent police
6 officer would conclude that a crime had been committed
7 and that these were the people who committed it, and
8 that these suspicions were confirmed I think is made clear
9 by the search, but we don't judge the legality of the
10 search by what was discovered, but, rather, what happened
11 before which would lead a reasonably prudent police officer
12 to conclude that a crime had been committed and that these
13 were the people who committed it.

14 In short, the people apprehended matched the
15 description given by Mr. Morales and they were found and
16 observed to be in the car which was described by Morales
17 and which the perpetrators got in immediately after trying
18 to pass the \$50 counterfeit bill.

19 More time might polish these findings, but
20 it won't alter the substance or my conclusions in any
21 way.

22 These will constitute my findings of fact
23 and conclusions of law. The motion to suppress is denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
UNITED STATES OF AMERICA,

:
: 77 Cr. 28 (LFM)
:

- v -

VICTOR DE LEON,

:
: MEMORANDUM
:

Defendant.
-----x

MacMAHON, District Judge.

Defendant moves to suppress (a) certain evidence seized from his person at the time of his arrest by New York City police officers, and (b) statements given by defendant following arrest. After an evidentiary hearing, we find the facts narrated in this memorandum and conclude that the officers had probable cause to arrest defendant, that the challenged search was incidental thereto, and that the motion must be denied.

An Hispanic male entered the C & G Discount Store at 101st Street and Broadway in New York City at approximately 7:00 P.M. on December 12, 1976. He

MICROFILM

MAR 14 1977

D attempted to buy a set of cologne and after shave lotion costing about \$8.00 and tendered a fifty-dollar bill to the manager of the store, George Morales. Morales did not believe the bill was genuine and conferred with Rosita Martinez, his assistant, who agreed that the bill was "no good." Morales, therefore, refused to accept the bill for the purchase.

Morales observed the man leave the store and proceed north on Broadway, where he was joined by another Hispanic male coming out of a liquor store a few doors away from the discount store. The two men then re-entered the discount store, and the second man tried to persuade Morales that the fifty-dollar bill was genuine. Morales still refused to accept the bill and the two men left the store.

Morales watched them both enter the passenger door of a blue Plymouth Roadrunner parked outside the store. One of the men got in the back seat, and the other got in the front passenger seat. A third man was in the driver's seat. Morales observed the car proceed south on Broadway.

An employee of the store telephoned the "911" emergency number of the New York City Police Department and reported the attempted passage of counterfeit currency. The information was relayed by radio to New York police officers Louis Sommella and Rashid Abdul-Rahim, who were cruising the area in a yellow taxi cab owned by the police department.

The officers went immediately to the discount store, where Morales told them what had happened and described the two men to the officers. He described one of them as about 5 feet 8 or 9 inches tall, of medium build, wearing a brown coat. He said he thought the individual was "Dominican or Spanish." He described the other man, also of Spanish origin, as 5 feet 3 or 4 inches tall, wearing a black cashmere coat. He also described the car they used as a blue Plymouth Roadrunner with a wide white racing stripe down the back and with the rear end jacked up like a racing stock car.

The officers, accompanied by Morales and a third officer, then drove south on Broadway in the police taxi cab. Reaching the vicinity of 91st Street,

the officers and Morales saw a car fitting the description given by Morales. Morales said, "that's the car," and then ducked down behind the front seat of the police taxi. Officer Sommella observed the Roadrunner stop at the curb, where one man got out of the car and proceeded on foot. The Roadrunner continued slowly southward on Broadway and then stopped again.

The police taxi pulled up alongside the Roadrunner, officer Sommella got out, identified himself as a police officer to defendant, an Hispanic male, who was the driver and by then the only occupant of the car. When defendant refused Sommella's direction to get out of the car, Sommella opened the door and pulled him out. One of the other officers pursued and apprehended the man who had previously gotten out of the car, and the two of them returned to where the Roadrunner and police taxi were stopped.

Officer Sommella conducted a pat-down search of defendant and, feeling a bulge in defendant's left coat pocket which the officer feared might be a weapon, reached into the pocket and removed a large wad of

apparently genuine currency. Continuing his search, Sommella found in defendant's right coat pocket the evidence now sought to be suppressed, six twenty-dollar bills and three fifty-dollar bills, all allegedly counterfeit. Officer Sommella observed that some of the bills bore identical serial numbers, and he then formally advised defendant that he was under arrest.

Because no search or arrest warrant had been issued prior to the challenged search of defendant, the seizure of evidence may only be justified if incident to a valid arrest. United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969). In the absence of federal statutory provisions, the validity of an arrest is determined by state law. United States v. DiRe, 332 U.S. 581, 589-90 (1948). Under New York law, a police officer may arrest a person for a crime when the officer has "reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise." N.Y. Crim.Proc. Law § 140.10(1)(b) (McKinney 1971). The standard of "reasonable cause" specified in that section is substantially the same as the federal standard of probable

cause. United States ex rel. Gonzales v. Follette, 397 F.2d 232, 234 (2d Cir. 1968); Sams v. New York State Bd. of Parole, 352 F. Supp. 296 (S.D.N.Y. 1972).

Although Morales' reliability was unknown to the police at the time he described the events in his store, the requirement of prior established reliability of government informants, enunciated in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), does not apply to information supplied by victims or participants in criminal activity. United States v. Rueda, Docket No. 76-1429 (2d Cir. Feb. 10, 1977) (slip op. at 1771); United States v. Miley, 513 F.2d 1191, 1204 (2d Cir. 1975); United States v. Burke, 517 F.2d 377, 380 (2d Cir. 1975).

On the basis of the facts described above, we conclude that the information known to officer Sommella was "sufficient to warrant a prudent man in believing that [defendant] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). The particular information supporting this conclusion was (a) the belief of Morales and Martinez, both retail store

clerks handling currency continually, that the tendered fifty-dollar bill was not genuine; (b) the accurate description of the Roadrunner which defendant drove away, which was different from any automobile the officer had seen in his precinct before or since this incident; (c) the location and direction of travel of the Roadrunner when first seen by the officer, which corroborated Morales' story, and (d) the Hispanic features of defendant, which fit comfortably within the description given by Morales.

Even though defendant may not have been one of the individual Morales saw in his store, the officers were justified in stopping a man of defendant's appearance driving or riding in the distinctive automobile described by Morales. There is no evidence that the officers had reason to know that defendant was not one of the two who had gone into the store. Although Morales was with the officers, he was crouched on the floor of the police taxi and did not see the man Sommella had pulled out of the car. The officers knew that at least one other man had already exited the car. Finally, the exigent circumstances presented by a suspect sitting in

a running automobile, capable of immediate and dangerous flight, clearly justified the officers' quick response without taking the time to obtain Morales' positive identification.

Under this set of facts, the search of defendant is warranted as a search incident to arrest, even if the arrest did not formally take place until after the search and seizure. United States v. Jenkins, 496 F.2d 57, 73 (2d Cir. 1974); United States v. Riggs, 474 F.2d 699, 704 (2d Cir.), cert. denied, 414 U.S. 820 (1973).

In any event, Sommella was justified in making at least an investigatory stop and frisk of defendant, in order to maintain the status quo, under the lower standards of suspicion required for such a stop. See N.Y. Crim.Proc.Law § 140.50 (McKinney 1976 Supp.); Terry v. Ohio, 392 U.S. 1 (1968); United States v. Gonzales, 362 F. Supp. 415 (S.D.N.Y. 1973). Sommella's subsequent discovery of several bills bearing the same serial numbers would then have justified a full arrest. United States v. Vigo, 487 F.2d 295, 298 (2d Cir. 1973); United States v. Del Toro, 464 F.2d 520 (2d Cir. 1972).

Under either of the above rationales, it is clear that the seizure of evidence was justified by the circumstances known to the arresting officer, and the evidence need not be suppressed, nor need the statements be suppressed as the fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). No issue is raised concerning the voluntariness of the statements.

Accordingly, defendant's motion to suppress is denied.

So ordered.

Dated: New York, N. Y.

March 8, 1977



LLOYD F. MacMAHON
United States District Judge

CERTIFICATE OF SERVICE

May 26 , 1977

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Stuart Lloyd Burnett